

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,
Plaintiff,

v.

KARL F. THOMPSON, JR.,
Defendant.

No. CR-09-88-FVS

ORDER RE NOTES AND
MEMORANDA

THIS MATTER comes before the Court for consideration of two reports that have been prepared by Magistrate Judge James P. Hutton. The government is represented by Timothy M. Durkin and Victor Boutros. The defendant is represented by Carl J. Oreskovich.

BACKGROUND

The Court ordered the parties to provide reciprocal discovery. This included pretrial disclosure of all statements that fall within the scope of the Jencks Act, 18 U.S.C. § 3500, and Federal Rule of Criminal Procedure 26.2. During the Winter of 2010, the defendant's lead attorney, Carl Oreskovich, interviewed a number of persons. Typically, a paralegal and/or one of his associates was present. Mr. Oreskovich asked questions. He and the person who accompanied him took notes; though the principal note-taking was done either by the paralegal or by the associate. The government suspected their notes contain information that is discoverable under the Jencks Act. Consequently, the government asked the Court to order Mr. Oreskovich

1 to disclose any Jencks Act statements. Mr. Oreskovich denied any of
2 the notes he and his colleagues had taken were discoverable. The
3 Court referred the dispute to Magistrate Judge James P. Hutton on
4 April 28, 2010, for a report and recommendation. 28 U.S.C. §
5 636(b)(1)(B). Magistrate Judge Hutton recognized the dispute that had
6 been referred to him involved an issue of fact, *United States v.*
7 *Miller*, 771 F.2d 1219, 1231-32 (9th Cir.1985), and he was authorized
8 to consider extrinsic evidence. *Goldberg v. United States*, 425 U.S.
9 94, 108-09, 96 S.Ct. 1338, 47 L.Ed.2d 603 (1976). Mr. Oreskovich's
10 paralegal, Jodi L. Dineen, sent two groups of items to Magistrate
11 Judge Hutton. One group consisted of handwritten notes. The other
12 group consisted of four typewritten memoranda. On May 10th,
13 Magistrate Judge Hutton issued a Report and Recommendation. He
14 concluded that none of the materials he had reviewed are discoverable.
15 However, he questioned whether he had received all of the relevant
16 materials. The government moved for reconsideration. In response,
17 Ms. Dineen submitted three additional sets of handwritten notes to
18 Magistrate Judge Hutton. On May 27th, he issued a Supplemental Report
19 and Recommendation. He adhered to his prior determination that the
20 handwritten notes are not discoverable under Rule 26.2. However, he
21 changed his mind with respect to three of the typewritten memoranda.
22 He concluded they are discoverable. Two of the memoranda were
23 prepared by Ms. Dineen. One of the memoranda was prepared by
24 associate attorney Courtney A. Garcea.

25 At that point, trial was scheduled to commence on June 7th. As
26 it turned out, trial did not commence on that day. Instead,
proceedings were stayed while the government appealed an unrelated
evidentiary ruling. The stay was lifted on May 31, 2011. The parties

1 were to file pretrial motions no later than July 21, 2011. The
2 defendant did not object to Magistrate Judge Hutton's Supplemental
3 Report and Recommendation until August 4, 2011.

4 Ms. Garcea and Ms. Dineen have submitted declarations in support
5 of the defendant's objection. Ms. Dineen's declaration states in
6 pertinent part:

7 The [typewritten] memo is my own narrative of what the
8 witness told us based on my paraphrased notes. When I
9 include the exact words a witness said I put those in
10 quotation marks to distinguish them from my own words. The
11 way in which I write the memo is so that someone who did not
12 attend the interview could read my memo and understand what
13 was said so it contains complete sentences made up of my own
14 words, not the verbatim testimony of the witness.

15 Declaration of Jodi L. Dineen at 2. Ms. Garcea's declaration is
16 similar. Among other things, it states:

17 Days, or often weeks after a witness interview, I sometimes
18 prepare a typed memorandum using my own words to describe
19 the content of the interview. These memorandum do not
20 contain exact wording or phrasing of the witnesses
21 interviewed. The typed memoranda contain my own language
22 and reflect my own narrative based on my paraphrased notes.
23 When I include the exact words of a witness, I use quotation
24 marks to distinguish those statements from my narrative.
25 For accessibility and easy comprehension, I reduce my
26 handwritten notes to complete sentences. These sentences
are written in my own words and are not a verbatim account
of what was said by the witness or interviewee.

Declaration of Courtney A. Garcea at 2.

RULING

A. Good cause exists for extending the 14-day deadline.

The defendant did not file an objection within 14 days of the

1 date upon which Magistrate Judge filed his Supplemental Report and
2 Recommendation. Thus, he has not complied with the letter of 28
3 U.S.C. § 636(b)(1) and Federal Rule of Criminal Procedure Rule 59(a).
4 However, the 14-day deadline is not jurisdictional. To the contrary,
5 a district court may consider an untimely objection. Fed.R.Crim.P. 59
6 advisory committee's note (2005 Amendments). In this instance, there
7 is good cause for doing so. Magistrate Judge Hutton filed his
8 Supplemental Report and Recommendation on May 27, 2010. Jury
9 selection was scheduled to begin on June 7th (11 days later). On June
10 7th, just prior to jury selection, the government announced its
11 intention to appeal an unrelated pretrial ruling. As a practical
12 matter, the government's announcement tolled the defendant's
13 obligation to file an objection to Magistrate Judge Hutton's
14 Supplemental Report and Recommendation. Arguably, the defendant
15 should have filed an objection by July 21, 2011, *i.e.*, the new
16 deadline for filing pretrial motions. Nevertheless, given the unusual
17 circumstances of this case, the Court will consider the defendant's
18 objection.

19 B. The materials that have been provided to the Court do not
20 contain any Rule 26.2 statements by an interviewee.

21 The defendant takes issues with one aspect of Magistrate Judge
22 Hutton's Supplemental Report and Recommendation; namely, his
23 determination that three typewritten memoranda contain interviewee
24 "statements" within the meaning of the Jencks Act and Federal Rule of
25 Criminal Procedure 26.2. It is useful to begin with subsection (a) of
26 Rule 26.2:

After a witness other than the defendant has testified on
direct examination, the court, on motion of a party who did

1 not call the witness, must order an attorney for the
2 government or the defendant and the defendant's attorney to
3 produce, for the examination and use of the moving party,
4 any statement of the witness that is in their possession and
that relates to the subject matter of the witness's
testimony.

5 The above-quoted text establishes the scope of the defendant's duty of
6 disclosure. He must disclose (1) "any statement" of (2) a person whom
7 he intends to call as a witness at trial that (3) "relates to the
8 subject matter of the witness's [expected] testimony" and (4) is in
9 his possession. Of the preceding elements, it is the first element --
10 "any statement" -- that is in dispute.

11 The term "statement" is defined by Rule 26.2. It includes the
12 following:

13 (1) a written statement that the witness makes and
14 signs, or otherwise adopts or approves;

15 (2) a substantially verbatim, contemporaneously
16 recorded recital of the witness's oral statement that is
contained in any recording or any transcription of a
recording; or

17 (3) the witness's statement to a grand jury, however
18 taken or recorded, or a transcription of such a statement.

19 Fed.R.Crim.P. 26.2(f). Neither subsection (1) nor subsection (3) is
20 applicable. Subsection (1) is inapplicable because Magistrate Judge
21 Hutton has determined there is no evidence indicating any of the
22 persons whom Mr. Oreskovich interviewed ever signed or approved the
23 notes which Mr. Oreskovich and his colleagues took; a determination
24 that is fully supported by the record. Subsection (3) is inapplicable
25 because the government is familiar with the testimony of the persons
26 who testified before the grand jury. Thus, the issue is whether
subsection (2) is applicable. In other words, the issue is whether

1 the disputed notes or memoranda contain "a substantially verbatim,
2 contemporaneously recorded recital of the witness's oral statement[.]"
3 Fed.R.Crim.P. 26.2(f).

4 The definition of the term "statement" that is set forth in Rule
5 26.2(f)(2) is the same in all material respects as the definition of
6 the term "statement" that is set forth in the Jencks Act. *Compare*
7 Fed.R.Crim.P. 26.2(f) (a "statement" is "a substantially verbatim,
8 contemporaneously recorded recital of the witness's oral statement")
9 with 18 U.S.C. § 3500(e)(2) (a "statement" is "a substantially
10 verbatim recital of an oral statement made by said witness and
11 recorded contemporaneously with the making of such oral statement").
12 As Magistrate Judge Hutton observed, one of the key phrases is
13 "substantially verbatim." In *Palermo v. United States*, 360 U.S. 343,
14 352-53, 79 S.Ct. 1217, 3 L.Ed.2d 1287 (1959), the Supreme Court
15 explained:

16 It is clear that Congress was concerned that only those
17 statements which could properly be called the witness' own
18 words should be made available to the defense for purposes
19 of impeachment. It was important that the statement could
20 fairly be deemed to reflect fully and without distortion
21 what had been said to the government agent. Distortion can
22 be a product of selectivity as well as the conscious or
23 inadvertent infusion of the recorder's opinions or
24 impressions. It is clear from the continuous congressional
25 emphasis on "substantially verbatim recital," and
26 "continuous, narrative statements made by the witness
recorded verbatim, or nearly so . . .," . . . that the
legislation was designed to eliminate the danger of
distortion and misrepresentation inherent in a report which
merely selects portions, albeit accurately, from a lengthy
oral recital. Quoting out of context is one of the most
frequent and powerful modes of misquotation. We think it

1 consistent with this legislative history, and with the
2 generally restrictive terms of the statutory provision, to
3 require that summaries of an oral statement which evidence
4 substantial selection of material, or which were prepared
5 after the interview without the aid of complete notes, and
hence rest on the memory of the agent, are not to be
produced.

6 (Internal citation omitted.) With these principles in mind, it is
7 appropriate to turn to the record.

8 The Court has examined the materials that were submitted to
9 Magistrate Judge Hutton. In addition, the Court has read both of the
10 reports he issued. Finally, the Court has read the declarations that
11 Ms. Garcea and Ms. Dineen filed during August of 2011. (Magistrate
12 Judge Hutton did not have the benefit of their declarations when he
13 prepared his reports.) Both Ms. Dineen and Ms. Garcea deny that
14 either their handwritten notes or their memoranda contain
15 substantially verbatim recitals of the interviewee's remarks. To the
16 contrary, both insist their notes and memoranda paraphrase the
17 interviewee's remarks; the only exception being an occasional direct
18 quotation, which is signified by the use of quotation marks. The
19 Court credits their declarations. Consequently, it is now clear (as
20 it was not during May of 2010) that the disputed materials are largely
21 paraphrases of the interviewees' answers, with an occasional direct
22 quotation included. No doubt, both the handwritten notes and the
23 memoranda closely track the answers given by the interviewees.
24 Nevertheless, the material in the notes and memoranda cannot be said
25 to be the interviewees' "own words[;] . . . fully and without
26 distortion[.]" *Palermo*, 360 U.S. at 352, 79 S.Ct. 1217. Thus,
neither the notes nor the memoranda contain Rule 26.2 statements by

1 the interviewee.

2 The government argues a paraphrase can constitute a Rule 26.2
3 statement. As authority, the government cites *United States v.*
4 *Griffin*, 659 F.2d 932, 938 (9th Cir.1981), *cert. denied*, 456 U.S. 949,
5 102 S.Ct. 2019, 72 L.Ed.2d 473 (1982). In that case, the Department
6 of Labor ("DOL") received a complaint that James Griffin had embezzled
7 funds from a union. DOL compliance officers began an investigation.
8 As part of the investigation, they interviewed a number of persons.
9 *Id.* at 934-35. At least some of the officers took handwritten notes
10 during the course of the interviews. The officers used their rough
11 notes to prepare formal reports. Some of the rough notes were
12 destroyed. Given the destruction, the district court dismissed the
13 indictment. *Id.* at 935-36. On appeal, much of the focus was upon
14 rough notes that had been destroyed by an Officer Logan. One of the
15 issues was whether her rough notes were "statements" within the
16 meaning of the Jencks Act. In that regard, the Ninth Circuit made the
17 following observation, "Whether original notes can be considered
18 'statements' under the Jencks Act depends, first, on whose statement
19 allegedly is contained therein; that is, against whose testimony at
20 trial they could be used as impeachment material." 659 F.2d at 937.
21 In *Griffin*, there were two possibilities. If the interviewee
22 testified as a government witness, counsel might use Officer Logan's
23 rough notes to impeach the interviewee. In that event, her notes
24 potentially contained the interviewee's Jencks Act statements. By
25 contrast, if she testified as a government witness, counsel might use
26 her notes to impeach her. In that event, her notes potentially
contained her Jencks Act statements. See *id.* The Ninth Circuit
considered both possibilities; beginning with the possibility that her

1 rough notes contained the interviewee's Jencks Act statements.
2 Officer Logan had submitted an affidavit concerning the contents of
3 her rough notes. She said they "were not a verbatim transcription of
4 the interviewee's remarks." *Id.* at 935. The Ninth Circuit said,
5 "[I]f Officer Logan's testimony is unrefuted, the rough notes could
6 not be Jencks Act statements of the interviewees under § 3500(e)(2)
7 since they are not verbatim recitals of the interviewees' oral
8 statements." 659 F.2d at 937. The Ninth Circuit also considered the
9 possibility that her rough notes contained her statements for purposes
10 of the Jencks Act. "[W]ith regard to that portion of an agent's notes
11 which records his thoughts and observations independent of the
12 interviewee's remarks, an agent's rough notes usually are considered
13 too cryptic and incomplete to constitute the full statement envisioned
14 by the Jencks Act." *Id.* But what if an agent's rough notes contained
15 an interviewee's remarks? Could the interviewee's remarks be
16 considered Jencks Acts statements vis-a-vis the agent and, thus,
17 necessitate the disclosure of the agent's rough notes? "No," answered
the Ninth Circuit:

18 [T]hat portion of the agent's rough interview notes which
19 does simply record, be it in either verbatim or paraphrased
20 form, the interviewee's remarks cannot be a "statement" for
21 Jencks Act purposes when the agent testifies as a government
22 witness because it does not represent the agent's own words.
23 As the Supreme Court recognized when it reviewed the
24 legislative history of the Jencks Act in *Palermo v. United*
25 *States*, 360 U.S. 343, 79 S.Ct. 1217, 3 L.Ed.2d 1287 (1957),
26 "It is clear that Congress was concerned that only those
statements which could properly be called the witness' own
words should be available to the defense for purposes of
impeachment." . . . Therefore, except in the unlikely
event that the civil compliance officers recorded their own

1 observations during the interviews in complete and full form
2 in their handwritten notes, the rough notes would not be
3 Jencks Act statements producible for the purpose of
4 impeaching the testimony of any one of the officers as a
government witness at trial.

5 *Griffin*, 659 F.2d at 938. In the preceding quotation, the Ninth
6 Circuit hypothesized a situation in which an agent's rough notes
7 contain a paraphrase of an interviewee's remarks. However, one must
8 consider the purpose of the hypothetical. The Ninth Circuit was not
9 determining whether a paraphrase of an interviewee's remarks can
10 constitute the interviewee's Jencks Act statements. The Ninth Circuit
11 had already addressed that issue. "[I]f Officer Logan's testimony is
12 unrefuted," said the Ninth Circuit, "the rough notes could not be
13 Jencks Act statements of the interviewees under § 3500(e)(2) since
14 they are not verbatim recitals of the interviewees' oral statements."
15 659 F.2d at 937. Instead, the Ninth Circuit was considering whether a
16 paraphrase of an interviewee's remarks can constitute the agent's
17 Jencks Act statements. The Ninth Circuit responded in the negative;
18 holding that an interviewee's remarks, whether verbatim or in
19 paraphrased form, cannot be the agent's Jencks Act statements because
20 they are not the agent's words. In sum, nothing in *Griffin* suggests
21 that notes and memoranda which paraphrase an interviewee's remarks can
be said to contain the interviewee's Rule 26.2 statements.

22 C. The disputed materials are analogous to the rough notes and
23 written reports of non-testifying officers.

24 The fact the disputed notes and memoranda do not contain an
25 interviewee's Rule 26.2 statements is not the end of the matter. The
26 Court also must consider whether the disputed notes and memoranda are
discoverable as the Rule 26.2 statements of either Ms. Dineen or Ms.

1 Garcia. See *Griffin*, 659 F.2d at 938 n.4. In order to resolve this
2 issue, it is necessary to return to the text of Rule 26.2(a). As will
3 be recalled, the defendant "must disclose (1) any statement of (2) a
4 person whom he intends to call as a witness at trial that (3) relates
5 to the subject matter of the witness's expected testimony and (4) is
6 in his possession." See *supra* at 5 (internal punctuation omitted).
7 Here, there is no reason to think either Ms. Dineen or Ms. Garcea will
8 testify. Thus, their notes and memoranda are analogous to the notes
9 and memoranda of non-testifying officers. As a result, they are not
10 discoverable under Rule 26.2.

11 **CONCLUSION**

12 The Court asked Magistrate Judge Hutton to examine the disputed
13 notes and memoranda during the Spring of 2010. Trial was looming.
14 The Court needed his assessment as soon as possible. He quickly
15 gathered the relevant materials and carefully and thoughtfully
16 examined them. The Court appreciates the time and effort he devoted
17 to the project. Not only that, but also the Court acknowledges his
18 assessment of the notes and memoranda was not unreasonable given the
19 information that was available to him at the time. Since then, the
20 record has expanded. In view of the information that is now
21 available, the Court finds the disputed notes and memoranda contain
22 paraphrases of the interviewees' answers. The paraphrases are not
23 close enough to the interviewees' original answers such that the
24 paraphrases can be said to be the interviewees' own words. That is to
25 say, the paraphrases are not substantially verbatim recitals of the
26 interviewees' answers. Consequently, the paraphrases do not
constitute the interviewees' statements within the meaning of Rule
26.2.

1. The Court adopts Magistrate Judge Hutton's initial Report and Recommendation (**ECF No. 272**).

3. The Court declines to adopt Magistrate Judge Hutton's supplemental Report and Recommendation (**ECF No. 363**). The notes and memoranda that have been submitted to the Court for *in camera* review are not subject to discovery pursuant to Federal Rule of Criminal Procedure 26.2.

DATED this 19th day of September, 2011.

ORDER - 12